MALAYAN BANKING BHD v. NEWAY DEVELOPMENT SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
AHMAD MAAROP CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASAN LAH FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 02(f)-19-05-2013(S)]
2 AUGUST 2017

LAND LAW: *Dealings in land – Native land – Purchase of land by non-native through native nominee – Whether in contravention of ss. 17(1) and 64(1) of Sabah Land Ordinance – Whether transaction tainted with illegality – Whether sale and purchase agreement void – Contracts Act 1950, s. 24(a) & (b)*

CONTRACT: *Illegality – Contravention of provisions of statute – Claim for outstanding amount under term loan by bank – Purchase of native land by non-native through native nominee – Whether in contravention of ss. 17(1) and 64(1) of Sabah Land Ordinance – Whether bank bona fide lender without knowledge of purpose of term loan – Whether transaction tainted with illegality – Whether sale and purchase agreement void – Whether contrary to public policy – Contracts Act 1950, s. 24(a) & (b)*

The appellant granted a term loan to the fourth respondent 'to part finance the purchase' of a native title in the District of Penampang, Sabah ('the native land'). The second and third respondents, the directors of the first respondent, guaranteed the term loan and the bridging loan facility given by the appellant to finance the development project on the native land and other native lands. As the fourth respondent was not a native by definition in law in Sabah and thus prohibited to buy directly any native land, a native nominee was used to hold the native land in her name in trust for and on behalf of the fourth respondent. It was the native nominee who entered into the sale and purchase agreement for the purchase of the native land and had also executed a power of attorney giving absolute power to the fourth respondent to sell, dispose of, charge or in any way deal with the native land. By a deed of assignment, the term loan was absolutely assigned by the fourth respondent to the first respondent and in turn, the fourth respondent stood as the corporate guarantor for the first respondent. The assignment was with the full knowledge and consent of the appellant. However, when the project was abandoned, the appellant cancelled the facility. The appellant's claim against all the respondents was for the outstanding sum of RM2,178,105.28 as at 31 October 2008. The High Court dismissed the appellant's claim on the grounds that the term loan was for an illegal purpose in that it was given for the purchase of the native land in contravention of ss. 17(1) and 64(1) of the Sabah Land Ordinance (Cap 68) ('SLO'). It was held that s. 17(1) of the SLO clearly prohibits any dealing between a native and a non-native in

respect of a native land. It was thus ruled that since the transaction was tainted with illegality, the sale and purchase agreement as a whole was void by virtue of s. 24(a) and (b) of the Contracts Act 1950. In turn, all the other instruments connected with the sale and purchase agreement such as the deed of assignment and the letters of guarantee were also tainted with illegality. The Court of Appeal agreed with the findings of the High Court and dismissed the appellant's appeal. Hence, the appellant obtained leave to appeal on the sole question of law of whether a deed of trust is a 'dealing' within the meaning of s. 4 of the SLO and therefore is illegal under ss. 17(1) and 64(1) of the SLO where the subject matter is a native title.

Held (dismissing appeal)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The leave question was academic and misconceived. It simply ignored the first stage of the transaction, namely, the purchase of the native land by the fourth respondent through the native nominee, which was obviously done in order to circumvent a clear statutory prohibition. The fact was confirmed by the execution of a successive power of attorney, an instrument prohibited by s. 64(2) of the SLO. As such, the purchase of the native land itself was illegal *ab initio*. By virtue of s. 24(a) and (b) of the Contracts Act 1950, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with illegality. (para 22)

(2) There was a deception practiced on the relevant land office in registering the native land under the name of the native nominee, when in truth, the real owner/buyer was the fourth respondent and thereafter registering the charge in favour of the appellant. The appellant could not say that it was a *bona fide* lender without any knowledge on the purpose of the term loan. It knew the purpose of the term loan and knew well that it was the fourth respondent who was the actual owner/purchaser of the native land using the native nominee in order to circumvent the prohibition of s. 17(1) of the SLO. Indeed, the appellant came to court with unclean hands. Such a deception was contrary to public policy and the registration was therefore illegal and invalid. (para 23)

***Bahasa Malaysia** Headnotes*

Perayu memberikan pinjaman berjangka kepada responden keempat 'untuk membiayai sebahagian pembelian' hak milik anak negeri di Daerah Penampang, Sabah ('tanah anak negeri'). Responden kedua dan ketiga, pengarah-pengarah responden pertama, menjamin pinjaman berjangka dan kemudahan penyambung yang diberikan oleh perayu untuk membiayai projek pembangunan tanah anak negeri tersebut dan tanah anak negeri yang lain. Oleh sebab responden keempat bukan anak negeri bawah definisi undang-undang Sabah dan dengan itu dilarang daripada membeli secara langsung apa-apa tanah anak negeri, seorang wakil anak negeri digunakan

untuk memegang tanah anak negeri atas namanya sebagai amanah untuk dan bagi pihak responden keempat. Wakil anak negeri memasuki perjanjian jual beli bagi pembelian tanah anak negeri dan memeterai surat kuasa wakil memberi kuasa mutlak kepada responden keempat untuk menjual, melupuskan, menggadai atau dalam cara apa pun, menguruskan tanah anak negeri tersebut. Melalui surat ikatan penyerahan hak, pinjaman berjangka diserah hak secara mutlak oleh responden keempat kepada responden pertama dan sebagai ganti, responden keempat bertindak sebagai penjamin korporat bagi responden pertama. Penyerahan hak tersebut adalah dengan pengetahuan penuh dan persetujuan perayu. Walau bagaimanapun, apabila projek tersebut terbengkalai, perayu membatalkan kemudahan tersebut. Tuntutan perayu terhadap kesemua responden adalah bagi tunggakan sejumlah RM2,178,105.28 setakat 31 Oktober 2008. Mahkamah Tinggi menolak tuntutan perayu atas alasan bahawa pinjaman berjangka tersebut adalah bagi tujuan yang menyalahi undang-undang kerana diberi bagi pembelian tanah anak negeri dan ini bertentangan dengan ss. 17(1) dan 64(1) Ordinan Tanah Sabah ('Ordinan'). Diputuskan bahawa s. 17(1) Ordinan jelas melarang apa-apa urusan antara anak negeri dan bukan anak negeri berkaitan tanah anak negeri. Oleh itu, diputuskan bahawa oleh sebab transaksi tersebut tercemar oleh kepenyalahan undang-undang, perjanjian jual beli tersebut secara keseluruhannya terbatal menurut s. 24(a) dan (b) Akta Kontrak 1950. Berikutan itu, kesemua instrumen lain berkaitan dengan perjanjian jual beli seperti surat ikatan penyerahan hak dan surat-surat jaminan juga tercemar oleh kepenyalahan undang-undang. Mahkamah Rayuan menyetujui dapatan Mahkamah Tinggi dan menolak rayuan perayu. Dengan itu, perayu memperoleh kebenaran merayu atas satu-satunya persoalan undang-undang sama ada surat ikatan amanah adalah 'dealing' dalam maksud s. 4 Ordinan dan oleh itu tidak sah dari segi undang-undang bawah ss. 17(1) dan 64(1) Ordinan di mana perkaranya adalah hak milik anak negeri.

Diputuskan (menolak rayuan)

Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Soalan kebenaran adalah akademik dan satu salah tanggapan. Ia tidak mengendahkan peringkat pertama transaksi, iaitu, pembelian tanah anak negeri oleh responden keempat oleh wakil anak negeri, yang jelas dibuat untuk memintas larangan statutori yang jelas. Fakta tersebut disahkan oleh pelaksanaan surat kuasa wakil berturutan, satu instrumen yang dilarang oleh s. 64(2) Ordinan. Oleh itu, pembelian tanah anak negeri itu sendiri tidak sah *ab initio*. Menurut s. 24(a) dan (b) Akta Kontrak 1950, mana-mana instrumen atau dokumen terkemudian yang berkait atau berbangkit daripada pembelian tersebut tercemar oleh kepenyalahan undang-undang.

(2) Terdapat penipuan yang diamalkan oleh pejabat tanah relevan dalam mendaftarkan tanah anak negeri bawah nama wakil anak negeri, apabila sebenarnya, pemilik/pembeli sebenar adalah responden keempat dan

kemudian mendaftarkan gadaian memihak pada perayu. Perayu tidak boleh mengatakan bahawa ia adalah peminjam *bona fide* tanpa pengetahuan tentang tujuan pinjaman berjangka tersebut. Ia mengetahui tujuan pinjaman berjangka itu dan berpengetahuan penuh bahawa responden keempat adalah pemilik/pembeli sebenar tanah anak negeri tersebut menggunakan wakil anak negeri untuk memintas larangan s. 17(1) Ordinan. Sememangnya, perayu tidak jujur dalam permohonannya. Penipuan sedemikian bertentangan dengan polisi umum dan dengan itu, pendaftaran tersebut salah dari segi undang-undang dan tidak sah.

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra (M) Bhd & Anor [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 HC ***(refd)***

Goh Seh Ho v. Tanavanus Sdn Bhd & Ors [1992] 2 CLJ 1005; [1992] 2 CLJ (Rep) 419 HC ***(refd)***

Hasmah Abdul Rahman v. Kenny Chua Kien Lam [2006] 2 CLJ 1029 CA ***(refd)***

International Bank Malaysia Bhd v Lovintih Balantai [2007] 6 CLJ 279 CA ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***

Tan Sri William Cheng Heng Jem & Anor v. Tan Sri Ngan Ching Wen & Ors [2012] 1 LNS 1196 HC ***(refd)***

Tinsley v. Milligan [1994] 1 AC 340 HL ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 2(g), 24(a), (b), (e)
Land Ordinance (Sabah) (Cap 68), ss. 17(1), 64(1)

Other source(s) referred to:

E Sihobing, *The National Land Code (1981),* Cap 14, pp. 333-334

For the appellant - Ronny Cham & Brenndon Soh; M/s Ronny Cham & Co
For the respondents - Baldev Sing; M/s Baldev Gan & Assocs

[Editor's note: For the Court of Appeal judgment, please see Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2012] 9 CLJ 1014 (affirmed).]

Reported by S Barathi

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[1] By a vesting order dated 17 August 2004 granted by the High Court of Malaya at Kuala Lumpur, all rights, powers and interest including all legal proceedings of Maybank Finance Berhad (MFB) were vested under the Malayan Banking Berhad, the appellant herein. Although the earlier financial transactions involved in this case were conducted by MFB, by virtue of the said vesting order, the appellant has absorbed all the rights and obligations of MFB including the right to claim against the respondents herein. Thus, in this judgment, any reference to the appellant in the earlier financial transactions refers to MFB.

[2] On 25 March 2013 this court granted the appellant leave to appeal on a sole question which reads:

> Whether a deed of trust is a 'dealing' within the meaning of section 4 of SLO and therefore is illegal under section *(sic)* 17(1) and 64(1) of the SLO where the subject matter is a native title.

For clarity 'SLO' refers to the Sabah Land Ordinance Cap. 68.

[3] The appellant is dissatisfied with the decisions of the High Court and the Court of Appeal dismissing its claim for the sum of RM2,178,105.28 as at 31 October 2008 against the first respondent in connection with a term loan totaling RM2.8 million (the term loan) given by the appellant to the fourth respondent on 30 January 1997 'to part finance the purchase' of a native land under Native Title Number 213013480, District of Penampang, Sabah (the native land) on 29 October 1996 from the original registered native owner Tan Haw Bin.

[4] The second and third respondents were the directors of the first respondent. They signed letters of guarantee dated 30 January 1997 and 8 September 1997 respectively to guarantee the term loan and the bridging loan facility given by the appellant. The second, third and fourth respondents were sued as guarantors for the term loan.

Brief Background Facts

[5] As alluded to above, the term loan was originally given by the appellant to the fourth respondent on 30 January 1997 'to part finance the purchase' of the native land initially by the fourth respondent. There were three other pieces of native lands purchased with a further term loan of RM2.2 million from the appellant. But these other native lands are not relevant in this appeal. The term loan for their purchases had been duly settled.

[6] As the fourth respondent was not a native by definition in law in Sabah and thus prohibited to buy directly any native land, a native nominee by the name of Chin Nyuk Fong (the native nominee) was therefore used to hold the native land in her name in trust for and on behalf of the fourth respondent. The native nominee was a staff of the fourth respondent. It was therefore the native nominee who entered into the sale and purchase agreement with the native owner to purchase the native land.

[7] The native nominee also executed a power of attorney dated 8 September 1997 which was subsequently revoked and replaced by another power of attorney dated 8 July 2002 giving absolute power to the fourth respondent to sell, dispose of, charge or in any way deal with the native land.

[8] By a deed of assignment dated 8 September 1997, the term loan was absolutely assigned by the fourth respondent to the first respondent. The fourth respondent in turn stood as the corporate guarantor for the first respondent. The assignment was with the full knowledge and consent of the appellant.

[9] The appellant also granted a bridging loan facility of RM6 million (the bridging loan facility) to finance the development project of the fourth respondent on the native land and the other native lands purchased. However, the facility was not utilised as the project was abandoned. The appellant therefore subsequently cancelled the facility.

[10] As the first respondent failed to settle the term loan and other financial facilities obtained from the appellant, steps were therefore taken to dispose of the native lands including the native land that were originally given as third party first legal charge securities to the appellant. The total sum obtained from the sales was only RM5.2 million. It was not sufficient to settle all the debts of the first respondent with the appellant leaving a partial outstanding balance of the term loan in the sum of RM1,715,956.32 as at 31 May 2006 with interest accruing.

[11] As at 31 October 2008, the sum outstanding balance of the term loan was RM2,178,105.28. The first respondent failed to settle the outstanding sum upon demand made by the appellant. A claim was thus filed against all the respondents for the outstanding sum due. However, it should be noted that the second and third respondents denied that there was any demand made on the sum claimed. Instead, a demand was made for a lower sum. However, this demand issue is not within the scope of the question posed. As such we need not deal with it in this judgment.

Findings Of The Courts Below

[12] The primary reason given by the High Court in dismissing the claim was that the term loan was for an illegal purpose in that it was given for the purchase of the native land in contravention of ss. 17(1) and 64(1) of the SLO. It was held that s. 17(1) of SLO clearly prohibits any dealing between a native and a non-native in respect of a native land. As such, it was ruled that since the transaction was tainted with illegality the whole sale and purchase agreement was void by virtue of s. 24(a) and (b) of the Contracts Act 1950. In turn, all the other instruments connected with the sale and purchase agreement such as the deed of assignment and the letters of guarantee were also tainted with illegality.

[13] The Court of Appeal agreed with the findings of the High Court and dismissed the appeal by the appellant.

Before This Court

Contentions Of The Parties

[14] The thrust of the contention of learned counsel for the appellant was that there was never a transfer of the native land from a native owner to a non-native. As such ss. 17(1) and 64 of SLO were never infringed. While there was a trust deed and capable of creating interest in the native land it was incapable of registration under the SLO. It was not 'dealing' as defined in the SLO. Thus, it was outside the ambit of any of the provisions of the SLO.

[15] Learned counsel went on to submit that the guiding case law then that was relied upon in the practice of land law in Sabah in respect of native land was the case of *Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra (M) Bhd & Anor* [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359; [1991] 2 MLJ 261 HC. It was held in that case that a trust deed could not be considered as dealing as defined under the SLO. Thus, it was submitted that there was no prohibition for a beneficiary of such trust deed to acquire equitable interest in a native land. The interest in such native land created by a trust deed would be between the trustee and the beneficiary. And it was thus pleaded before us that in view of the understanding of the law then prevailing, that is, as per the decision in *Borneo Housing Mortgage Finance Bhd (supra),* many such trust deeds were created on native lands. As such, to uphold the judgments of the courts below in this case would result in severe losses for many parties. Reference was also made to the case of *Tan Sri William Cheng Heng Jam & Anor v. Tan Sri Ngan Ching Wen & Ors* [2012] 1 LNS 1196; [2013] 8 MLJ 417.

[16] In response, learned counsel for the respondents supported the judgments of the courts below and prayed that this appeal should be dismissed with costs. He submitted that the 'sole and unqualified purpose or object of the said term loan was to enable' the fourth respondent and not the native nominee to purchase the native land. The purchase of the native land by the native nominee as the trustee of the fourth respondent using monies provided by the said term loan was clearly and obviously a "dealing" in the native land by the fourth respondent because the native land was 'affected by the said transaction'.

[17] Learned counsel also contended that the '"object" or purpose of the said term loan was of such a nature that, if permitted, would defeat the provision of s. 17(1)' of the SLO by allowing the fourth respondent to "deal" with the native land. It would also defeat s. 64(1) of the SLO by allowing the fourth respondent 'to acquire an interest' in the native land.

[18] Learned counsel then went on to submit that 'the term loan facility was unlawful (ie, illegal), unenforceable and void by virtue of ss. 24 and 2(g) of the Contracts Act 1950'.

[19] On the issue of illegal agreement, learned counsel said that 'the law pertaining to an illegal agreement where the parties are both equally blameworth (ie, in *pari-delicto*) is clear'. In the present case, both the appellant and the fourth respondent were 'in *pari-delicto* in entering into the said term loan which had its sole purpose' of enabling a non-native to acquire an interest in the native land. And since the term loan 'is clearly an unlawful or illegal agreement and cannot be enforced', the deed of assignment dated 8 September 1997 is also tainted with illegality.

[20] In respect of the letters of guarantee of the second and third respondents, learned counsel said that they 'are tainted with illegality and are unenforceable and void'. Similarly, the corporate guarantee of the fourth

respondent 'is also tainted with illegality and unenforceable and void'. Those documents were intended 'to secure repayment of monies for an illegal agreement (ie, the term loan facility) are themselves made for an unlawful purpose pursuant to s. 24(a) and/or (b) of the Contracts Act 1950.'

Decision Of This Court

[21] For convenience, we reproduce the relevant provisions of the SLO and Contracts Act 1950.

SLO:

Section 4:

"dealing" means any transaction of whatever nature by which land is affected under this Ordinance;

Section 17:

Land dealings with natives.

> Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.

Section 64(1) and (2):

(1) This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest therein by way of charge or otherwise.

(2) Notwithstanding the provisions of any written law, any power of attorney whereof the donee or any donee is a non-native, if it relates to any land held under this Part, shall be null and void.

Contracts Act 1950: Section 24:

The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[22] At the outset, we would think that the leave question is academic and misconceived in relation to this appeal. Our reason is this. It simply ignored the first stage of the transaction, namely, the purchase of the native land itself through the native nominee. It was obviously done in order to circumvent a clear statutory prohibition. As such the purchase was clearly illegal as correctly found by the courts below. It was not disputed that it was the fourth respondent who was the actual purchaser of the native land through the

native nominee. Such fact was confirmed by the execution of successive power of attorney, an instrument prohibited by s. 64(2) of the SLO. In the power of attorney dated 8 July 2002, the native nominee purportedly gave absolute powers to the fourth respondent to deal with the native land. Obviously, the fourth respondent must have been very well aware of the statutory prohibition. As such, the purchase the native land itself was illegal *ab initio*. Section 24(a) and (b) of the Contracts Act 1950 is clear. In our view, no amount of gymnastic argument could remedy the default. Thus, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality. Hence, even the third party first legal charge security for the term loan given by the appellant was also tainted with illegality.

[23] There was also a deception practiced on the relevant land office, a part and parcel of the public administration in this country, in registering the native land under the name of the native nominee when in truth the real owner/buyer was the fourth respondent and thereafter registering the charge in favour of the appellant. And the appellant could not be heard to say that it was a *bona fide* lender without any knowledge on the purpose of the term loan. It knew the purpose of the term loan and knew well that it was the fourth respondent who was the actual owner/purchaser of the native land using the native nominee in order to circumvent the prohibition of s. 17(1) of the SLO. Indeed, the appellant came to court with unclean hands. In our view, therefore such a deception is contrary to public policy. The registration is therefore illegal and invalid. (See: s. 24(e) of the Contracts Act 1950).

[24] In *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 at p. 231 (CLJ); p. 640 (MLJ) this court said this:

> It should also be said that public policy is not static. 'The question of whether a particular agreement is contrary to public policy is a question of law ... It has been indicated that new heads of public policy will not be invented by the courts for the following reasons ... However, the application of any particular ground of public policy may vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise ... The rule remains, but its application varies with the principles which for the time being guide public opinion' (*Halsbury's Law of England*, (5th Ed Vol 22) at para 430).

[25] And in *Hasmah Abdul Rahman v. Kenny Chua Kien Lam* [2006] 2 CLJ 1029; [2006] 5 MLJ 236 the core of the dispute was on the purported purchase by the appellant of 170,000 shares in a company called SBBS which was formerly known as Syarikat Binaan Budi Sawmill Berhad, a company involved in logging business. The thrust of the claim by the respondent was that he was the wholly beneficial owner of the shares in SBBS. The appellant was merely a trustee of the shares held by her in SBBS since she did not pay for them. The respondent utilised the appellant in order to float SBBS on the second board of the then Kuala Lumpur Stock Exchange ('KLSE'). To succeed in the float, the respondent was required to comply with several

requirements by the Securities Commission ('SC'), the KLSE and the relevant provisions of the Companies Act 1965 and the Securities Commission Malaysia Act 1993. The respondent gave the impression to the relevant authorities by way of statutory declarations that all the requirements were complied with including the purported 30% Bumiputera equity participation in Malaysian incorporated companies in line with the spirit and objectives of the Malaysian Government's Policy. SBBS was therefore successfully listed on the second board on or around 7 July 1997.

[26] In allowing the appeal by the appellant in that case, the Court of Appeal said this in respect of the purchase of the shares of SBBS at paras. 27 and 28 of the judgment:

> Hence, in our view the purported sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end.' There was indeed a deception practiced on the relevant approving bodies which were part and parcel of the public administration in this country. Indeed, the respondent had come to seek for assistance from the court with unclean hands. The transaction was therefore tainted with illegality right from the start and thus unenforceable.
>
> ... the question of the role played by the appellant in the impugned transaction would be quite irrelevant ... In any event the consequential that usually follows in any declared illegal transaction is commonly denoted by the maxim 'the loss lies where it falls'. Thus, in this case it is inevitable but to say: 'let the transacted shares and the rights and bonus issues shares lie where they fall'.

[27] Further, in the present case, the appellant in pleading its claim against the first respondent relied, *inter alia*, on the breach by the first respondent of the terms and conditions in the third party first legal charge over the native land given as a security for the term loan. This is obvious in paras. 7 and 10 of the statement of claim as amended. The appellant could not therefore be heard to say that its claim was independent of the transaction found tainted with illegality. (See: *Tinsley v. Milligan* [1994] 1 AC 340 HL; *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494; [1996] 2 MLJ 141).

[28] Hence, even assuming that the question posed is answered in the negative it will not alter the ultimate outcome of this appeal. For the above reason alone that this appeal should be dismissed.

The Trust Instrument And Dealing

[29] Now on the term 'dealing' as defined in the SLO in relation to a trust deed, the Court of Appeal in dismissing the claim of the appellant said this:

> ... the wordings of section 17(1) of the Ordinance impose a bar on any dealings involving a non native on one part and a native on the other. The object or purpose of the Term Loan was such a nature that if permitted it would defeat the provisions of section 17(1) and 64(1) of the Ordinance. Under that scheme of provision it is patently clear to us that

A the Term Loan Agreement made between the plaintiff and the 4th defendant to facilitate the purchase of the native land was made in contravention of section 17(1) of the Ordinance. As a result, the agreement is tainted with illegality and forbidden by law. In totality, the agreement becomes unlawful and unenforceable (see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* (1998) 3 MLJ 151; *St John Shipping Cory* B *Joseph Rank Ltd* (1957) 1 QB 267 and *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* (1990) 1 MLJ 356). Quite apart from this, the whole agreement also becomes a void agreement within the meaning of section 24 and Section 2(g) of the Contracts Act 1950. Since the whole transaction is tainted with illegality, consequently all the other connected instruments such as the Deed of Assignments, Letters of Guarantee C executed pursuant to the agreement are also tainted with illegality. (See *Spencer v. Agenda* (1971) 3 All ER 417).

...

... it is evident that through the instrument of a trust deed Chin purported to hold the native land in trust for the 4th defendant to enable the 4th D defendant to purchase the native land though a non native. To us, this constitutes "dealing" within the definition of section 4 of the Ordinance. As such, we cannot accede to the plaintiff's arguments as this will mean that creation of a trust deed to circumvent the provisions of section 17(1) of the Ordinance is valid.

E This cannot be the intention of the legislators. Clearly, section 17(1) of the Ordinance prohibits any kind of dealings and this will include any trust deed created to circumvent the Ordinance. In this regard, we would like to refer to the case of *OCBC Bank (Malaysia) Bhd v. Master Arc Sdn Bhd & 8 others (unreported)* (Civil Suit No K 22173-2000), wherein Justice Ian Chin J remarked the following:

F > The Land Ordinance has a wider encompass in its definition where it defined the term in the following words "... any transaction of whatever nature by which land is affected under this ordinance...". Clearly then an attempt by a trust deed would be one of the nature of dealing which Section 17 of the Sabah Land Ordinance seeks to strike down

G We accept the forgoing passage by the learned Judge as a correct statement of law. In the premises, we affirm the proposition that the use of nominees (be it in the name of a trust) to circumvent the prohibition of dealings in the native lands between a non native and a native is illegal and contravenes section 17(1) and section 64(1) of the Ordinance.

H **[30]** We wholly endorse the approach and reasons given by the Court of Appeal and affirm the principles of law enunciated thereof.

[31] We do not think the reference to the view of Judith E Sihombing in her book '*The National Land Code (1981)*' in Cap 14 pp. 333334 can assist the argument of learned counsel for the appellant. The learned author expressed I her view on the term 'dealing' in respect of the National Land Code. She opined thus:

> The term 'dealing' refers to a **transaction in land entered into in accordance with the provisions of the code** which, when completed and an instrument in statutory form is registered, gives rise to a substantive entry on the register appropriate to the transaction. (emphasis added).

It should be noted that even the learned author predicated her statement with the phrase 'a transaction in land entered into in accordance with the provisions of the code'. Obviously the initial transaction must be valid to begin with. In the present case we find otherwise. Further, we agree that the term 'dealing' in the SLO' is of wider scope as indicated by the courts below. Hence and with respect the view of the learned author is quite irrelevant in this case.

[32] In respect of the contention that the law affecting native land in Sabah should be as propounded in the case of *Borneo Housing Mortgage Finance Bhd (supra)*, we wholly disagree. We are of the view that that case was wrongly decided and we hereby overrule it. In fact, in a subsequent case of *Goh Seh Ho v. Tanavanus Sdn Bhd & Ors* [1992] 2 CLJ 1005; [1992] 2 CLJ (Rep) 419 the same judge addressed the meaning of 'dealing' in the SLO and he said this:

> ... The subject matter, that is quarrying for stones, is not a 'dealing' within the meaning of section 17(1) of the Sabah Land Ordinance. The 'quarrying of land' does not require to be registered. 'Dealing' as defined in section 4 means any transaction or instrument capable of registration within the Ordinance. It would have been otherwise if the agreement had been one of sale and purchase.

[33] In another case of *International Bank Malaysia Bhd v. Lovintih Balantai* [2007] 6 CLJ 279 that involved a native land and a native nominee arranged by a true non-native purchaser to secure a bank loan, the Court of Appeal in dismissing the appeal by the bank said this, *inter alia*:

> ... The appellant is a local bank in the State Sabah. They must have knowledge of the restrictions in dealings over land held under Native Title pursuant to the land laws of Sabah. They cannot come to court and claim that the title to the said land is a clean title and maintain that they are a *bona fide* party for value without notice upon registration of a land dealing and indirectly ignoring the law relating to Native Lands in Sabah.

[34] Accordingly, for the above reasons, our answer to the question posed is in the affirmative. We therefore dismiss this appeal with costs.